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No. 95-273

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KEYSTONE SANITATION COMPANY, INC., *et al.*,
Petitioners,

v.

ARCATA GRAPHICS FAIRFIELD, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY TO BRIEF IN OPPOSITION OF RESPONDENT QUEBECOR PRINTING FAIRFIELD INC. (FORMERLY KNOWN AS ARCATA GRAPHICS FAIRFIELD, INC.)

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The Brief in Opposition filed by respondent Quebecor Printing Fairfield Inc. ("Arcata") attempts to cloud the reasons why this Court should grant certiorari in this case, and warrants a brief reply.

1. Arcata first claims that Keystone has not preserved for review the question presented in the petition. Opp. 10-12. The question presented is whether a party may be held to have waived its attorney-client privilege—even as

to undisclosed documents—as a result of the inadvertent disclosure of privileged material. *See* Pet. i. Keystone plainly raised that question both before the District Court and in its petition for a writ of mandamus filed with the Third Circuit. Before the District Court, Keystone raised the argument that the inadvertent disclosure of the two e-mail messages should not result in a waiver of its privilege as to the billing statements in responding to Arcata's motion to compel, *see* Pet. App. 14a, and in its own motion for reconsideration. *See id.* at 19a. The District Court recognized that the issue before it—"a difficult one"—was "whether a privilege has been waived on the grounds of inadvertent disclosure." *Id.*

Contrary to Arcata's suggestion, Keystone did not somehow abandon this issue before the Third Circuit. In its "Statement Of Issues Involved" in its mandamus petition, Keystone asked whether the inadvertent disclosure of the two e-mail messages waived the Keystone defendants' "attorney client privilege with their counsel concerning their rights and liabilities with regard to transfers of their assets." Petition for Writ of Mandamus 1. On the merits of the question, Keystone emphasized that the disclosure "Did Not Constitute A Waiver Of Privilege As To Any Other Document Or Testimony Because The Production Was Made Inadvertently And Not For The Advantage Of The Keystone Defendants." *Id.* at 14 (argument heading). Keystone focused on the consequences of the disclosure for the billing statements rather than the e-mail messages themselves because the e-mail messages were not at issue on the motion to compel and, as Keystone noted, "[t]o try to return the [e-mail messages] to a privileged status at this point would be like trying to unscramble an egg." *Id.* That practical recognition that the confidentiality of the e-mail messages—which were *not* at issue—had already been compromised in no way constituted a failure to preserve for this Court's review the question of the consequences of inadvertent disclosure on the privileged status of the documents that *were* at issue.

On the contrary, the legal question whether the inadvertent disclosure waived the privilege at all remained at issue in the case because it could very well have been determinative of the status of those documents that were the subject of the motion to compel. Thus, for example, in those courts holding that inadvertent disclosure cannot waive the privilege (the rule urged by petitioners), the motion to compel disclosure of the billing statements would have been denied on the strength of that rule without regard to the status of the already-disclosed e-mail messages. The fact that this dispute is not directly about the e-mail messages plainly does not, as Arcata would have it, make the split of authority on the effect of inadvertent disclosures irrelevant to a decision on the documents that were at issue on the motion to compel. Instead, as noted in the petition, this fact makes the case a particularly appropriate vehicle for resolving the conflict in the lower courts. *See* Pet. 24.

2. Although Arcata tentatively suggests in footnote that there "appears" to be no circuit split "as to whether an inadvertent disclosure *can* waive the privilege," Opp. 11 n.9 (emphasis in original), its effort to distinguish the cases discussed in the petition is unavailing. Contrary to Arcata's claim, the Eighth and Ninth Circuits have squarely held that an inadvertent disclosure does not waive the privilege. In *United States* v. *Zolin*, 809 F.2d 1411 (9th Cir. 1987), *aff'd in part and vacated in part*, 491 U.S. 554 (1989), a secretary disclosed certain tapes reflecting privileged communications, mistakenly thinking the tapes were blank. On the basis of that lone fact, the Ninth Circuit concluded that the disclosure was "sufficiently involuntary and inadvertent to be inconsistent with a theory of waiver." 809 F.2d at 1417. Other courts, moreover, have understood that "the Ninth Circuit * * * held in *Zolin* * * * that an inadvertent disclosure is not a waiver." *Georgetown Manor, Inc.* v. *Ethan Allen, Inc.*, 753 F. Supp. 936, 938 n.3. (S.D. Fla. 1991). *See also*

Comment, *Inadvertent Disclosure in the Age of Fax Machines: Is the Cat Really Out of the Bag?*, 46 Baylor L. Rev. 385, 391 (1994) (discussing *Zolin* as example of "no waiver" approach).[1]

Arcata's attempt to distinguish the Eighth Circuit's decision in *John Morrell & Co.* v. *Local Union 304A*, 913 F.2d 544 (8th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991), is no more successful. There, an expert witness turned over privileged documents to John Morrell's union adversaries in a separate case; the Eighth Circuit held that "[t]he fact that the Unions inadvertently gained access to the [privileged] documents does not affect" their status as privileged documents. 913 F.2d at 556. It plainly *would* in the First or District of Columbia Circuits, and *might* in the Third or Fifth Circuits. *See* Pet. 7-8.[2]

Arcata more confidently elevates to text its assertion that there is no circuit conflict over whether an inadvertent disclosure of privileged documents waives the privilege as to other undisclosed documents, Opp. 12-13, but the

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[1] Arcata's reliance upon *United States* v. *Plache*, 913 F.2d 1375 (9th Cir. 1990), and *Weil* v. *Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18 (9th Cir. 1981), is misplaced, because both cases involved not inadvertent but deliberate disclosures. *See Plache*, 913 F.2d at 1380 ("Plache's disclosure * * * was not inadvertent. He purposefully testified about what Lipman had told him."); *Weil*, 647 F.2d at 23-25 & n.13 (corporate officer "voluntarily disclosed" counsel's advice during deposition).

[2] Arcata contends that the Eighth and Ninth Circuit decisions turned on the particular facts of the cases, Opp. 11 n.9, but the only fact that the court in each case found pertinent was that the disclosure was inadvertent. Arcata's claim that there is no circuit split also overlooks the decision of the Court of Military Appeals in *United States* v. *Ankeny*, 30 M.J. 10 (C.M.A. 1990), which held that an inadvertent disclosure does not waive the privilege. *See* Pet. 8, 23. Conflicts between decisions of the Court of Military Appeals and the regional Courts of Appeals are reason enough to grant certiorari. *See, e.g., Davis* v. *United States*, 114 S. Ct. 2350 (1994). Arcata makes no effort to respond to *Ankeny* in its brief.

point loses its force upon scrutiny. First, there is in fact a circuit conflict on the question, because three courts of appeals—the Eighth and Ninth Circuits and the Court of Military Appeals—find no waiver at all due to inadvertent disclosure, even as to the documents that were disclosed, and so *a fortiori* find no waiver with respect to undisclosed documents. Second, the breadth and depth of disagreement on the question of the consequences of inadvertent disclosure on undisclosed documents, even among those courts that find or may find a waiver as to the disclosed documents, plainly warrants resolution by this Court. *See* Pet. 8-9, 21-22.

Arcata's effort to minimize the conflict on the question presented is belied by the courts themselves. *See, e.g., Pavlik* v. *Cargill, Inc.*, 9 F.3d 710, 713 (8th Cir. 1993) ("Courts * * * have adopted three positions"); *United States* v. *Ankeny*, 30 M.J. at 17 n.6 ("[c]ivilian courts have taken varying positions on the inadvertent-disclosure problem") (citing circuit cases); *United States* v. *Zolin*, 491 U.S. 554, 573 n.11 (1989) (noting "controversy concerning the legal effect of an inadvertent disclosure which does not constitute a waiver of the privilege"). *See also* Pet. 10-13 (citing courts and commentators confirming the existence of the conflict).

In this case, Keystone was held to have waived the attorney-client privilege as to undisclosed, otherwise privileged materials because of the inadvertent disclosure of two privileged documents. That result would not have been reached in the Eighth or Ninth Circuits, in at least eight other federal districts not within those circuits, or in the military justice system. *See* authorities cited at Pet. 8-9. And the five-factor analysis employed below would not have been used in finding a waiver in the First or District of Columbia Circuits. *See id.* at 7. This Court should grant the petition to resolve this conflict.

3. In an attempt to distract the Court from the question presented, Arcata dwells on the facts of the underlying case, but the facts Arcata focuses on are not relevant to the legal issue before the Court. The question presented is whether an inadvertent disclosure of privileged material gives rise to a waiver of the privilege, even as to undisclosed documents on the same subject. It is undisputed that the e-mail messages were (1) privileged, Pet. App. 14a, 18a-19a; Pet. 5 n.4, and (2) inadvertently disclosed. Pet. App. 18a. No other facts are necessary to resolve the question presented.

4. There is simply no merit to Arcata's suggestion (Opp. 13-14) that the Third Circuit did not rule on the inadvertent disclosure issue. The Third Circuit expressly said that it was denying the petition for a writ of mandamus after consideration of petitioners' contention that the District Court "erred in finding that petitioners had waived their attorney-client privilege with regard to communications with their counsel concerning their rights and liabilities with regard to transfers of their assets." Pet. App. 5a. If the Third Circuit harbored some other, undisclosed reason for denying Keystone relief, that court will be able to address that reason upon remand from this Court, once the proper standards for evaluating the waiver claim have been established.

Nor is Arcata's contention that this case involves a discovery matter best left to the trial court's discretion well taken. Opp. 17. The question presented concerns the attorney-client privilege, and "this Court has a special duty to clarify aspects of the law of privileges properly before us." *Upjohn Co.* v. *United States,* 449 U.S. 383, 403-404 (1981) (Burger, C.J., concurring in part and in the judgment). In addition, several circuits do *not* agree that this issue is best left to the trial court's discretion. The First and the District of Columbia Circuits, for example, find a waiver of the privilege even if the disclosure

is inadvertent. The Eighth and Ninth Circuits and the Court of Military Appeals find no waiver if the disclosure is inadvertent. *See* Pet. 7-8. The issue is not regarded in those circuits, as Arcata would have it, as a "discovery ruling" "left almost entirely to the trial court's exercise of its discretion." Opp. 17. That is what the conflict is about, and why this Court should grant certiorari.

5. There is no answer in Arcata's brief to the point that an uncertain privilege "is little better than no privilege at all." *Upjohn*, 449 U.S. at 393. *See* Pet. 16 . There is no answer to the dilemma posed by the existence of an ABA ethics opinion which "conflicts directly" with the law in those circuits allowing a waiver based on inadvertent disclosure. *In re United Mine Workers*, 156 F.R.D. 507, 512 (D.D.C. 1994). *See* Pet. 18. There is no answer to the clear trend among state courts to adopt the position urged by petitioners, and rejected by the courts below. *See* Pet. 19-20 n.15.

At the end of the day, the reasons why this Court should grant certiorari in this case are highlighted by what Arcata does *not* argue in its brief in opposition. Arcata does not dispute that there are entrenched conflicts in the federal courts over the question of the legal effect of an inadvertent disclosure; that the question is one of exceptional importance and arises with great frequency; that the disclosure of privileged materials in this case was inadvertent; and that the Court of Appeals denied Keystone's request for relief from the District Court's ruling that the inadvertent disclosure constituted a waiver of the privilege. These are conditions sufficient to warrant the granting of Keystone's petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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